Supreme Court, U.S.
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No. 99-1415

IN THE

Supreme Court of the United States

ROSS ADAMS,

Petitioner,

v.

DAVID & BARBARA DRISCOLL,
RUEL & PATRICIA GALBREATH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

DONALD D.J. STACK
Counsel of Record
MARTIN A. SHELTON
STACK & ASSOCIATES, P.C.
Attorneys for Respondents
800 Flatiron Building
84 Peachtree Street
Atlanta, Georgia 30303
(404) 525-9205

158789

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

3 cpp

QUESTIONS PRESENTED

Whether the Eleventh Circuit Court of Appeals correctly applied the Clean Water Act's base effluent standard found in 33 U.S.C. § 1311 where Petitioner discharged a pollutant into waters of the United States without a permit.

Whether a perennial stream is waters of the United States under the Clean Water Act when it is a tributary of navigable waters.

Whether private citizens acting pursuant to the Clean Water Act's citizen suit provisions of 33 U.S.C. § 1365, are entitled to summary judgment on the issue of Petitioner's liability for the discharge of a pollutant into waters of the United States where there is no genuine dispute of fact.

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STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition In The Courts Below

Respondents filed their Complaint in the Northern District of Georgia on December 18, 1996, challenging Petitioner's discharge of pollutants into waters of the United States and onto Respondents' properties. (R1-1). The Complaint alleged violations of the Federal Water Pollution Control Act, (hereinafter referred to as the "Clean Water Act"), 33 U.S.C. §§ 1311 and 1342, by Petitioner's discharge of pollutants into waters of the United States without a permit, as well as pendant state law claims for damages to Respondents' properties. (R1-1). Petitioner filed an Answer pro-se on February 10, 1997, (R1-3), including a counterclaim later dismissed by the Court upon Respondents' motion. (R1-4, R1-9).

After completion of discovery, on August 26, 1997, Petitioner filed a Motion to Dismiss Respondents' Clean Water Act claims. Respondents filed their Response Brief on September 11, 1997, (R1-24), and Petitioner filed his first Reply Brief five days later. (R1-29). Meanwhile, Respondents filed their Motion for Summary Judgment on their Clean Water Act claims as well as their pendant state law claims, (R1-32, R2-40, and R1-33), on September 25, 1997. On October 13, 1997, Petitioner filed a response which failed to offer any evidence or affidavits in response to Respondents' Motion for Summary Judgment. (R1-35).

On November 17, 1997, the District Court gave Petitioner a second opportunity to file a response to Respondents' Motion for Summary Judgment in order to submit evidence or affidavits in his favor. (R2-39-1).

The Court specified that Petitioner's Motion to Dismiss would be treated as a Motion for Summary Judgment. (R2-39-2). Thus, on November 26, 1997, the District Court allowed Respondents to file Supplemental Briefs in support of their Motion for Summary Judgment, (R2-44), and in Response to Petitioner's Motion to Dismiss. (R2-43).

Having now obtained legal counsel, Petitioner submitted his Response to Respondents' Motion for Summary Judgment and a second Reply Brief in Support of his Motion to Dismiss on December 10, 1997. (R2-46). Respondents filed their Reply Brief in support of their Motion for Summary Judgment on January 12, 1998. (R2-49).

On February 10, 1998, Magistrate John Strother, Jr. filed a Report and Recommendation on Petitioner's Motion to Dismiss/Motion for Summary Judgment and Respondents' Motion for Summary Judgment. (R2-50-2). The Magistrate Judge recommended that Petitioner's Motion to Dismiss/ Motion for Summary Judgment be granted, and that Respondents' Motion for Summary Judgment be denied. (R2-50-9). In accordance with the Report and Recommendation's prescribed procedure, Respondents filed their Objections to the Report and Recommendation with the District Court Judge on February 20, 1998, (R3-52), supplementing these objections with additional evidence on March 23, 1998. (R3-55). District Court Judge William O'Kelley heard oral arguments on Petitioner's Motion to Dismiss/Motion for Summary Judgment and Respondents' Motion for Summary Judgment on March 23, 1998. (R3-56). Shortly thereafter, the District Court adopted the Magistrate's Report and Recommendation as the final Order of the Court, thereby granting Petitioner's Motion to Dismiss/

Motion for Summary Judgment and denying Respondents' Motion for Summary Judgment on March 26, 1998. (R3-58-2). Judgment was entered in favor of Petitioner on March 30, 1998. (R3-59-1).

Respondents filed their Notice of Appeal to the Eleventh Circuit on April 24, 1998. (R3-60). After thorough and extensive briefing on all of the issues and oral arguments before a three judge Circuit Court panel, on July 23, 1999, the Eleventh Circuit issued its decision on the appeal, reversing both the District Court's award of summary judgment to Petitioner and the denial of summary judgment to Respondents on their Clean Water Act claim and remanding the case for further proceedings consistent with its decision. *Driscoll v. Adams*, 181 F.3d 1285 (11th Cir. 1999), *reh'g* and *reh'g en banc denied*, 196 F.3d 1263 (1999). Following the Eleventh Circuit's denial of Petitioner's Motion for Rehearing En Banc on September 17, 1999, the District Court adopted the Eleventh Circuit's opinion in accordance with the Circuit Court mandate on January 5, 2000. Since the entry of the Circuit Court's mandate that Respondents' Motion for Summary Judgment on the Clean Water Act claim be granted, Respondents have requested that summary judgment be granted on Respondents' remaining state law claims and that a hearing be held before the appropriate trier of fact to determine civil penalties for Petitioner's Clean Water Act violations.

B. Statement Of Facts

Contrary to Petitioner's statement of facts, Respondents David and Barbara Driscoll are residents of Alpharetta, Georgia (in the Atlanta area) who also own approximately five acres in the North Georgia mountains bisected by the

Spiva Branch stream, which flows through a man-made pond before continuing onto Respondents Galbreaths' property. (R1-33-1, R2-35-1). Respondents Ruel and Patricia Galbreath own approximately two acres downstream of the Driscolls, also bisected by the Spiva Branch which forms a second similar pond before continuing on to the Nottely River. (R1-33-2, R2-35-1). Respondents purchased these properties in the early 1990s and utilize them as seasonal/ retirement homes due to the peaceful, clean quality of the property and the tranquil surrounding environment. (R1-1-3, R1-1-4). Prior to the commencement of land disturbing activities on Petitioner's property, the waters on Respondents' properties were clear and free of pollution, including sediment or eroded soils. (R2-40-55, R2-40-43, R2-40-47). Respondents have established through the use of a professional hydrologist that the Spiva Branch flowing through Respondents' properties is a perennial stream. (R2-40-39). At the time of the discharges, Petitioner owned approximately seventy-six acres, purchased in January, 1995, adjacent to, above, and upstream of Respondents' properties. (R1-9-1).

In March, 1995, Petitioner authorized subcontractors to clear his property of all timber to prepare the property for real estate development. (R2-46-3). Although Petitioner mistakenly states that this work was conducted under a silvaculture exemption, such an exemption does not apply where the re-cultivation of trees is not contemplated. *See Environmental Defense Fund v. Tidwell*, 837 F. Supp. 1344 (E.D.N.C. 1992). Indeed, this fact was recognized by the Superior Court of Union County which held in

Petitioner's suit against the local issuing authority[1] that the activities on Petitioner's property were clearly land disturbing activities. (R2-40-85).

During the clear-cutting of the timber on Petitioner's property, no erosion and sedimentation control Best Management Practices ("BMPs"), which are required for all land disturbing activities under the Georgia Erosion and Sedimentation Act of 1975, ("Georgia E&S Act") O.C.G.A. § 12-7-1, *et seq.*, were followed, despite ongoing discharges of eroded soils and sediment from the site. (R2-46-3, R2-40-93). BMPs are requirements for construction practices and the use of structures specifically designed to manage water flow, to control and contain eroded soils and sediment on a given site, and to manage the discharge of such materials to keep them at minimal or undetectable levels. Approximately eight months later, in November, 1995, after clearing his land of all commercially valuable trees, Petitioner continued further activities directed toward the development of the parcel for residential real estate. (R1-33-2, R2-46-3). In addition, approved BMPs still were not installed to prevent the discharge of eroded soils and sediment. Indeed, Petitioner discarded tree stumps and other tree debris into the stream. (R2-46-3).

Respondents began noticing significant amounts of pollutants in the stream and ponds in the early spring of 1996. (R2-40-44). Greatly concerned about the growing amount of pollution in the water, Respondents reported the damage to the appropriate State agencies in April, 1996. (R1-1-8). Meanwhile, Respondents hired an environmental consultant in May, 1996, who measured approximately 52 cubic yards (roughly 64 tons or 128,000 pounds) of sediment deposited into the ponds as a result of Petitioners' activities, as well as

1. *Adams v. Gooch & Union County*, Civil Action Number 96-CV-378-HS, Superior Court of Union County, Judge Hugh W. Stone. (R2-40-83), dismissed on the County's Motion to Dismiss. (R2-40-88).

an additional two to three cubic yards deposited in the stream up gradient of the ponds. (R2-44-10, R2-44-15).

Respondents also hired another expert consultant who specialized in erosion and sedimentation control. He reviewed the properties in July, 1996, December, 1996, and August, 1997 and recorded similar eroded soil and sediment deposits as well as an ongoing failure to implement proper BMPs on Petitioner's property. (R2-40-38 through 39). For example, that expert observed land disturbing activities on slopes ranging from 20 to 60 degrees and along the stream banks without the use of BMPs. (R2-40-39). No BMPs or other measures were in place to prevent discharges of eroded soils and sediment discharging from pipes and drainage ditches. (R2-40-38). Tree tops, dirt, rock and other debris were dumped into the steam. (R2-40-38, R2-40-93, R2-40-96). Moreover, Petitioner constructed an illegal rock check dam in the streambed itself which collected eroded soils and sediment before allowing them to continue downstream. (R2-40-40).

Refusing the proffered advice of several State regulatory agencies, Petitioner did not implement any approved BMPs on his property to control the pollutants being discharged, (R1-1-8), although he did install several pipes in the stream and continued grading activities. (R2-46-4). Contrary to Petitioner's statements, Petitioner did not obtain an approved Erosion and Sedimentation Control Plan for a local land disturbance permit until February, 1997, twenty-three months after land disturbing activities began and several months after this suit was filed. (R2-46-5). Yet, even after this approval, granted in the midst of Petitioner's suit against the local issuing authority, Petitioner continued to discharge eroded soil, rock, sand, sediment, debris, and other pollutants into waters of the

United States which flow through Respondents' properties. (R1-33-2). In fact, Petitioner admitted in sworn deposition testimony that BMPs were not implemented on his property, (R6-90), and that he discharged eroded soils and sediments into the stream and down onto Respondents' properties. (R6-102, R2-46-4). Even as late as August, 1997, the last time Petitioner's property was inspected by Respondents, it was evident that proper BMPs still were not being implemented or adequately maintained where they did exist. (R2-40-40). As a result, pollutant discharges were still continuing from Petitioner's property and the site still had yet to be stabilized. (R2-40-40). Such discharges of pollutants significantly diminish the stream's aesthetic value and significantly hinder the ability of stream vegetation, fish, and other organisms to survive by raising the water temperature and covering the stream and pond beds with layers of sediment. (R2-44-6, R2-44-11). As a tributary of the Nottely River, the Spiva Branch is classified as a primary trout water under Ga. Comp. R. & Regs. r. 391-3-6-.03(14)(b).

Although Respondents repeatedly advised Petitioner of the adverse impacts of his activities, Petitioner never obtained a National Pollution Discharge Elimination System ("NPDES") discharge permit as required by the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, and the Georgia Water Quality Control Act, O.C.G.A. § 12-5-1, *et seq.* (R6-106). Under the Clean Water Act, 33 U.S.C. § 1342, permit issuing authority is delegated to the State of Georgia pursuant to the Georgia Water Quality Control Act. Under the authority of both of those Acts, Georgia issues NPDES permits for discharges of pollutants from point sources, including storm water discharges. Although Petitioner apparently submitted a Notice of Intent to be covered under Georgia's NPDES general storm water permit for his construction development

activities in September, 1996, (R2-46-31), this submission was made one and a half years after beginning land disturbance activities and long after the discharges began. (R6-95).

Petitioner never obtained an individual NPDES permit for stormwater discharge or any other point source discharge NPDES permit then available, (R6-106). Nor did Petitioner ever implement proper BMPs, (R6-90, R2-50-6), or otherwise make any effort to prevent the discharge of pollutants in violation of the Clean Water Act. (R2-50-5 through 6). As a result, Petitioner has discharged eroded soils, sediment, rock, sand, debris and other materials defined as pollutants by 33 U.S.C. § 1362(6) into the waters of the United States which flow through Respondents' properties. (R6-102, R6-105).

Petitioner has stated that he offered to clean up the damages caused by his activities but was rebuffed by Respondents. Although such an offer of compromise may not be considered at trial, Respondents unfortunately must address here Petitioner's misleading portrayal of this "offer." In truth, Petitioner offered to clean out Respondents' ponds with his septic tank equipment, but he refused to allow the remediation work to be undertaken by a professional. In addition, Petitioner refused to address the underlying sources of pollution on his property. Finally, Petitioner made the unconscionable demand that Respondents make false statements to government regulatory officials to assist Petitioner in avoiding an enforcement action. As a result, Respondents could not accept Petitioner's offer. Respondents' subsequent offers to settle this matter were flatly rejected.

REASONS FOR DENYING THE WRIT

Petitioner has identified no valid reasons for granting his requested Writ of Certiorari. He has failed to identify any conflicts in the Circuits on the issues in the case at bar. Nevertheless, Respondents will address and refute each of the issues raised by Petitioner.

I. The Federal Courts have jurisdiction to apply the Clean Water Act's base effluent standard found in 33 U.S.C. § 1311 where Petitioner discharged a pollutant into waters of the United States without a permit.

Clean Water Act § 1311 absolutely prohibits the discharge of any pollutant into waters of the United States from any source except where a valid Clean Water Act permit has been obtained. 33 U.S.C. § 1311; *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 310-311 (1981); *Environmental Protection Agency v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 (1976). Congress provided potential dischargers with a very simple choice: either obtain a permit and comply with the terms of the permit or do not discharge pollutants. Moreover, 33 U.S.C. § 1365(f) clearly states, that for the purposes of citizen's suits under that section, ". . . the term 'effluent standard or limitation under this chapter' means (1) . . . an unlawful act under subsection (a) of section 1311 of this title." Section 1365(f) goes on to include other effluent standards or limitations set by other sections of the Act or within permits (usually by the agency). 33 U.S.C. § 1365(f). Thus, it is clear that the violation of § 1311 pollution prohibition constitutes a violation of an "effluent standard or limitation under this chapter."

Indeed, it is well settled under Clean Water Act case law that § 1311's pollution prohibition is an effluent standard which may be enforced through a citizen's suit. *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996), *cert. denied*, 519 U.S. 811, 117 S. Ct. 57 (1996); *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1993), *rev'd in part on other grounds*, 505 U.S. 557 (1992); *United States v. Frezzo Bros., Inc.*, 602 F.2d 1123, 1128 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980). Indeed, *Sierra Club, Lone Star* held that citizen's suits for discharging pollutants without a permit are allowed where no such limitation was in place.[2] Therefore, it is clear that 33 U.S.C. § 1311 is itself an enforceable effluent standard which can be met by *either* obtaining a qualifying permit *or* by not discharging pollutants in the first place.

Before the Eleventh Circuit, Petitioner argued that 33 U.S.C. § 1311 cannot be an enforceable effluent standard unless set by an administrative agency. However, this assertion is incorrect. The power of the administrative agency to administer federal statutes and to prescribe rules and regulations is not the power to make law, but rather to adopt measures that effectuate the will of Congress as expressed by statute. *Legal Environmental Assistance Found., Inc. v. U.S.E.P.A.*, 118 F.3d 1467 (11th Cir. 1997), *citing Dixon*

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2. *See, e.g., Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 117 (2nd Cir. 1994), *cert. denied*, 514 U.S. 1082 (1995); *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1061 (5th Cir. 1991); *Menzel v. County Utils. Corp.*, 712 F.2d 91, 94 (4th Cir. 1983); *Washington Wilderness Coalition v. Helca Mining Co.*, 870 F. Supp. 983, 986 (E.D. Wash. 1994); *Hawaii's Thousand Friends, Life of the Land, Inc. v. City and County of Honolulu*, 806 F. Supp. 225, 230 (D. Hawaii 1992); *Hudson River Fisherman's Ass'n v. County of Westchester*, 686 F. Supp. 1044, 1050 (S.D.N.Y. 1988).

v. United States, 381 U.S. 68, 74 (1965). The first question which must be addressed is whether Congress has spoken to the issue at hand. *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). If the intent of Congress is clear, that is the end of the matter; the Court and the agency must give effect to the unambiguously expressed intent of Congress. *Id.* Indeed, the starting assumption is that Congress said what it meant when drafting legislation. *United States v. LaBonte*, 520 U.S. 751 (1997). It is hard to imagine a clearer expression of Congressional intent than that found in 33 U.S.C. § 1311: no discharge except pursuant to a permit under the Act. In passing 33 U.S.C. § 1311, Congress enacted a law which agencies strive to work within and which the courts enforce. As such, Respondents have not sought the creation of a new standard. The standard has existed since the Clean Water Act was created by the 1972 Amendments to the then existing Federal Water Pollution Control Act.

Moreover, in addition to Petitioner's steadfast refusal to acknowledge the clear statutory language and relevant case law establishing 33 U.S.C. § 1311 as an enforceable effluent standard, Respondents also note that Petitioner has failed to meet the effluent standard found at Ga. Comp. R. & Regs. r. 391-3-6-.03(5)(d). That effluent standard was promulgated under the Georgia Water Quality Control Act, O.C.G.A. § 12-5-1, *et seq.*, which implements the Clean Water Act at the state level. Georgia's Water Quality Rules mandate the following turbidity standard:

> All waters shall be free from turbidity which results in a substantial visual contrast in a water body due to a man-made activity . . . For land disturbing activities, proper design, installation, and

> maintenance of Best Management Practices and compliance with issued permits shall constitute compliance with Paragraph 391-3-6-.03(5)(d).

Ga. Comp. R. & Regs. r. 391-3-6-.03(5)(d). Respondents submitted ample evidence in the courts below demonstrating the discoloration of the waters of the United States flowing through their properties (R2-40-58 through 60) and Petitioner's failure to follow proper BMPs. (R1-1-8, R6-90, R2-50-6). Under *Culbertson v. Coats American, Inc.*, 913 F. Supp. 1572, 1581-82 (N.D. Ga. 1995), a Clean Water Act citizen's suit can be brought for a violation of Georgia Water Quality Regulations promulgated pursuant to the Clean Water Act's delegation to Georgia. Therefore, there is an administratively promulgated effluent standard, in addition to 33 U.S.C. § 1311, which Petitioner has violated in the case at bar.

II. The Eleventh Circuit correctly determined the Spiva Branch stream to be waters of the United States under the Clean Water Act.

Petitioner has tried to mischaracterize the case at bar as unrelated to any waters of the United States; however, this is not true. Petitioner apparently believes that only public waters are subject to regulation and that the only public waters in this country are those found within public lands. However, it is clear that the definition of waters of the United States is not that restrictive. Indeed, the stated policy of the Clean Water Act is ". . . to restore and maintain the chemical, physical and biological integrity of *the Nation's waters*." 33 U.S.C. § 1251(a) (emphasis added). Yet, the determinative factor as to whether the waters at issue here are susceptible to regulation under the Clean Water Act is whether the waters in question are waters of the United States.

The Clean Water Act applies to navigable waters, 33 U.S.C. § 1251, which are defined under the Act as the waters of the United States. 33 U.S.C. § 1362(7). The definition includes any watercourse which flows in a watershed system which eventually becomes navigable, *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317 (6th Cir. 1974), or which has an effect on interstate commerce. *Hoffman Homes, Inc. v. Administrator, U.S.E.P.A.*, 961 F.2d 1310, 1319 (7th Cir. 1992). In the Eleventh Circuit, these holdings are followed by *United States v. Eidson*, 108 F.3d 1336, 1340 (11th Cir. 1997), *cert. denied*, 522 U.S. 899 (1997), and, *cert. denied*, 522 U.S. 1004 (1997), which dealt with pollutant discharges into a storm water drainage ditch which eventually flowed into Tampa Bay. In *Eidson*, the Court held that tributaries, including canals and storm drains, of navigable waters and waters affecting interstate commerce, have long been recognized as falling within the ambit of "waters of the United States." *Id.* at 1342. Moreover, the Court held that even intermittent tributaries qualify as "waters of the United States" if the water can eventually find its way into navigable waters. *Id.*

Here, there is no question that the waters at issue are waters of the United States. The record contains a United States Geological Survey topographic map showing the stream which originates on Petitioner's property to be a tributary of the Nottely River which itself flows into the Tennessee River after crossing the Georgia-Tennessee state line and thence eventually to the Gulf of Mexico. (R2-40-76) Any tributary which eventually flows into navigable or interstate waters is covered under the Clean Water Act. *State of Georgia v. City of East Ridge, Tenn.*, 949 F. Supp. 1571, 1578 (N.D. Ga. 1996). Moreover,

although substantial amounts of sediments have settled in the Respondents' ponds, the waters in these ponds are constantly flowing down the course of the Spiva Branch into the Nottley River. Therefore, sediments being carried into these waters are also moving downstream with these waters. The receiving waters on Respondents' properties are themselves waters of the United States.

III. Private citizens, acting pursuant to the Clean Water Act's citizen's suit provisions of 33 U.S.C. § 1365, are entitled to summary judgment on the issue of Petitioner's liability for the discharge of a pollutant into waters of the United States where there is no genuine dispute of fact as to Petitioner's liability.

Petitioner's final argument is that it is not fair for a citizen to obtain summary judgment against Petitioner for violations of the Clean Water Act without a determination by a jury. Yet, Petitioner's argument fails for many reasons. First, Petitioner has waived the argument as he has never raised this argument until this Petition for Certiorari. Second, it is both lawful and constitutional for citizens to bring an action for violations of the Clean Water Act under 33 U.S.C. § 1365. Finally, an order of summary judgment where there is no dispute of fact is also a lawful, constitutional, and well-settled vehicle for adjudicating a dispute. Indeed, even though Petitioner has not yet been denied a jury trial on civil penalties, even in such an event, such a deprivation would not be a violation of his constitutional rights.

A. The Court should decline to review this issue because it was not litigated in the Courts below.

Petitioner's final issue, the appropriateness of summary judgment in lieu of a jury trial where there is no dispute of material fact on the issue of civil liability, has been raised for the first time in the instant Petition for Writ of Certiorari. Generally, when an argument or issue is raised for the first time on appeal, the Court will not decide those questions not raised or decided in the courts below. *Singleton v. Wulff*, 428 U.S. 106, 96 S. Ct. 2868, 2877 (1976). *See, e.g. California v. Taylor*, 353 U.S. 553, 556-57 n.2, 77 S. Ct. 1037, 1039-40 n.2 (1957). Indeed, in *Hormel v. Helvering*, 312 U.S. 552, 556, 61 S. Ct. 719, 721 (1941), the Court reasoned that this rule is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues. . . . in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence."

In *Higginbotham v. Ford Motor Co.*, 540 F.2d 762 (1976), the Fifth Circuit Court of Appeals explained that the determination turns on the need for further factual development. In situations where further factual development would have occurred in the trial court had the new theory been presented there, it is inappropriate for the court to consider the new theory on appeal. Where, however, the new theory is a purely legal question, and no factual development is needed for its resolution, there is no unfairness in addressing the question on appeal. This is particularly true where "manifest injustice would result from ignoring the new legal theory." *Id.* at 768 n.10.

Here, although Petitioner's claim is purely legal and requires no further factual development, thereby satisfying the exception discussed by *Higginbotham*, there is no substantive validity to this claim. Thus, no manifest injustice would result if this issue was not considered by the Court. Additionally, Petitioner presents no reason why this legal theory could not have been raised before the Eleventh Circuit. Therefore, while the Court retains discretion to hear issues not raised below, Petitioner presents no valid reason for the Court to deviate from the standard rule.

B. 33 U.S.C. § 1365 authorizes private citizens to bring civil actions for violations of the Clean Water Act.

In the Clean Water Act, Congress clearly expressed a policy of encouraging and facilitating citizen participation in the Clean Water Act's enforcement, providing at 33 U.S.C. § 1251(e), that "[p]ublic participation . . . shall be provided for, encouraged, and assisted by the Administrator and the States." Such public participation is to be undertaken under the auspices of the citizen's suit provision found in 33 U.S.C. § 1365 and utilized by Respondents here. These citizen enforcement provisions were included in the Clean Water Act by Congress to ensure diligence on the part of the agency administering the Act by authorizing citizens to undertake enforcement where the Administrator is reluctant or unwilling to do so.

In the real world, an administrator cannot be everywhere at once since the allocation of resources will not permit it. Indeed, decisions concerning similar citizen's suit provisions under the Resource Conservation and Recovery Act ("RCRA") have recognized the important role that citizen's suits play in the federal environmental regulatory scheme as the agency must often selectively enforce its rules due to pressure on resources

and a need to get the "big" polluters first. *Sierra Club v. Chemical Handling Corp.*, 824 F. Supp. 195, 197-98 (D. Colo. 1993). "Indeed, a RCRA violation is only 'small' to one who does not live near the offending facility." *Id.* at 198. Thus, the Court held that the action was a testament to Congressional wisdom in including the citizen's suit provision. *Id.* Likewise, Clean Water Act violations are not small or otherwise unworthy of enforcement to those individuals who are forced to endure the consequences of the discharger's actions.

33 U.S.C. § 1365 allows any citizen to commence a suit against another person who is in violation of the effluent limitations required by the Clean Water Act. Such action is an enforcement action only. The plaintiffs themselves are not authorized to recover damages. *Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1016 (7th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980). Thus, the action taken by the Respondents here is on behalf of the United States which is otherwise authorized to commence the enforcement action through the agency. The enforcing agency has the primary authority where it chooses to exercise its jurisdiction. *Montgomery Envtl. Coalition Citizens Coordinating Committee on Friendship Heights v. Washington Suburban Sanitary Com.*, 607 F.2d 378 (D.C. Cir. 1979). However, where the enforcement agency does not act, the citizen is vested with the authority as a "private attorney general." *Connecticut Fund for the Env't v. Job Plating Co.*, 623 F. Supp 207 (D. Conn. 1985); *Marathon Oil v. Environmental Protection Agency*, 564 F.2d 1253 (9th Cir. 1977) (holding that a citizen suit against the holder of a NPDES permit may be maintained even where EPA declines to prosecute on the ground that the violation was unavoidable).

Indeed, the Court explicitly approved of the citizen's suit provision in *Middlesex County Sewerage Authority v. National Sea Clamers Ass'n*, 453 U.S. 1, 101 S. Ct. 2615 (1981), where the Court affirmed Congress's intent to provide qualifying individuals with a cause of action to enforce the provisions of the Clean Water Act as "private Attorneys General."

The action taken by the Respondents in this case was commenced under this provision in the absence of any action by other State or Federal agencies. That the action is "on behalf of the United States" is relevant only in the determination of who receives the civil penalties assessed against the defendant. As such, Respondents' action is constitutional and authorized by law.

C. Citizen plaintiffs are entitled to summary judgment on the issue of liability under the Clean Water Act where there is no genuine dispute of fact as to a defendant's violation of the Clean Water Act.

As with all civil actions brought in Federal court, the Federal Rules of Civil Procedure ("FRCP") determine procedural matters raised in this action. *See* FRCP 1. Moreover, FRCP 1 also requires that those rules ". . . shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." Therefore, consistent with that clause of FRCP 1, FRCP 56 provides, in part, that a claimant may seek summary judgment where there are no "genuine issues of material fact." Indeed, "one of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. . . ." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 2553 (1986). Moreover, partial summary

judgment may be granted by a *judge* on claims that are not in controversy, while those claims or issues for which a genuine controversy exists may be reserved for trial. FRCP 56(d). Furthermore, under the rule, this option may be exercised when liability is clear, but the extent of damages is in dispute. FRCP 56(c). Thus, summary judgment proceedings assessing liability against the petitioner without a jury are lawful under the Federal Rules of Civil Procedure.

In addition to being authorized by law, a grant of summary judgment in the absence of a jury determination is also constitutional. "[I]n ordinary litigation, the Seventh Amendment does not require a jury trial where there are no facts in dispute. . . ." *Coleman v. Commissioner of Internal Revenue*, 791 F.2d 68 (7th Cir. 1986); *See also Sullivan v. United States*, 788 F.2d 813, 816 (1st Cir. 1986). Of course, where there are genuine issues of material fact in dispute, summary judgment is inappropriate and those factual disputes must be resolved by a jury or similar trier of fact. *See Narramore v. United States*, 852 F.2d 485 (9th Cir 1988) (holding that summary judgment was inappropriate where there was a question of fact as to whether the flooding onto the plaintiff's land exceeded the level allowed under a flowage easement).

Nevertheless, an issue of fact is considered "genuine" "if the record as a whole could lead a reasonable trier of fact to find for the nonmoving party." *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S. Ct. 2505, 2510 (1986); *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997). A party opposing a motion for summary judgment must set forth specific facts to show that the issue is genuine. The party cannot simply rely on the allegations

of its pleadings. *Anderson*, 106 S. Ct. at 2510. An issue is "material" "if it might affect the outcome of the case under the governing law." *Anderson*, 106 S. Ct. at 2510; *Redwing Carriers, Inc*, 94 F.3d at 1496; *Allen*, 121 F.3d at 646. Irrelevant or unnecessary factual disputes will not prevent the grant of summary judgment. *Anderson*, 106 S. Ct. at 2510. The burden of showing that there is no genuine issue of material fact initially rests with the party moving for summary judgment. *Celotex Corp.*, 106 S. Ct. at 1553. In establishing this, all facts are taken in the light most favorable to the non-moving party. *Allen*, 121 F.3d at 646. Once this burden has been met, the burden then shifts to the non-moving party. *Id.* At that point, the non-moving party must show that genuine issues of material fact do exist. *Id.* "If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Anderson*, 106 S. Ct. at 2511.

Here, there is no question that there were no genuine issues of material fact regarding the issue of liability. Indeed, even the District Court could not find any dispute of fact regarding Petitioner's liability, although that Court did incorrectly apply the governing law. The Eleventh Circuit's grant of summary judgment under the correct interpretation of the applicable law was appropriate. Because there were no disputes as to the facts which determine Petitioner's liability, the Court was able to make that determination as a matter of law without depriving Petitioner of any Seventh Amendment right to a trial by jury.

Indeed, the conclusion here that summary judgment is appropriate for determining Petitioner's liability is consistent with the Supreme Court's holding in *Tull v. United States*, 481 U.S. 412, 107 S. Ct. 1831 (1987). There, the Supreme

Court addressed the issue of whether the Seventh Amendment required a trial by jury for a claim brought by the United States against a real estate developer under the Clean Water Act. After review of the facts there, the Court held that in that instance a determination of liability necessitated a jury trial under the Seventh Amendment, *Id.* at 420, 425, as it was undisputed that there were genuine issues of material fact unresolved. *Id.* at 415. However, the Court clearly stated that the requirements of a jury trial are **not** applicable where there are no facts in dispute. *Id.* at 419 (*citing Hepner v. United States*, 213 U.S. 103, 29 S. Ct. 474, 53 L. Ed. 720 (1909)).

In addition, even though Petitioner has not been denied a hearing or trial on the assessment of civil penalties for his violations of the Clean Water Act, the Court in *Tull* held that a jury trial was not required under the Seventh Amendment for the determination of the extent of damages imposed. *Id.* at 426-27. Notably, the Court recognized that Congress did not provide for such a right in enacting the Clean Water Act. *Id.* at 425. Rather, such calculation may be determined by a judge. *Id.* at 427. Thus, in the case at bar, there is no issue for determination regarding Petitioner's entitlement to a jury trial.

IV. The Court should decline to review because there are no conflicts in the Circuits and the issues presented by Petitioner are not sufficiently important to warrant the Court's review.

Petitioner has stated in his Petition for Writ of Certiorari that review is warranted to correct a conflict in the Circuits. However, as stated before, Petitioner has failed to identify that conflict. In fact, there is no conflict created by the

Eleventh Circuit's decision in the case at bar. Prior to the decision in the Circuit Court here, the only applicable precedent in the Eleventh Circuit was *Hughey v. JMS Dev.*, 78 F.3d 1523 (11th Cir. 1996), *cert. denied*, 519 U.S. 993, 117 S. Ct. 482 (1996)[3], which created a narrow, four part exception to 33 U.S.C. § 1311's discharge effluent standard where (1.) compliance is impossible, (2.) no permit exists, (3.) standards mirroring proposed NPDES permit conditions are followed, and (4.) the discharges are minimal. This detailed test *must* be met before the holding of *Hughey* can be invoked. The lower court determined that this exception did not apply in the case at bar since few of the elements of the critical four-part test were met here. *See Driscoll v. Adams*, 181 F.3d 1285 (11th Cir. 1999). To the extent that any conflict ever existed, it was with the Fifth Circuit's decision in *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996), *cert. denied*, 519 U.S. 811, 117 S. Ct. 57 (1996), handed down virtually contemporaneously with *Hughey*. However, the Eleventh Circuit in the case at bar took pains in its opinion to reconcile any conflicts between those two decisions and its holding in the case at bar, thereby eliminating any potential conflicts within the Circuits on these issues. *Driscoll*, 181 F.3d at 1290.

Before the Eleventh Circuit, Petitioner did cite to a number of cases stating that the Clean Water Act does not apply to stormwater regulation. However, other than *Hughey v. JMS Dev.*, Petitioner failed to cite to any cases decided after

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3. Respondents note that the Court denied the Petition for Writ of Certiorari in *Hughey v. JMS Dev.* on many of the same issues as those raised in the instant Petition.

the passage of the 1987 Amendments to the Clean Water Act which brought discharges of pollutants through stormwater under the Act's jurisdiction. When the Clean Water Act was initially enacted in 1972, Congress chose to exempt stormwater discharges in order to allow the Agency to address the then more serious problem of point source discharges. However, fifteen years later, as pollutant discharges within stormwater became more serious, Congress responded by enacting 33 U.S.C. § 1342(p), which created a NPDES stormwater discharge permit to address pollutants which may be discharged via stormwater. The grace period for meeting the requirements of the 1987 Amendments expired in 1993. 33 U.S.C. § 1342(p). Therefore, only cases decided subsequent to this date can be used to discuss NPDES stormwater discharge permits. However, the standard which governs this permit is the same as the original point source discharge permit: no pollution may be discharged except with a NPDES permit. 33 U.S.C. § 1311. Thus, there is no conflict within the Circuits here to be resolved.

Finally, Petitioner has argued that enforcing the Clean Water Act in this instance would not only be expensive for him, but would also detrimentally affect future enforcement of the Clean Water Act. Despite his emotional hyperbole and the invocation that he must be allowed to violate the Clean Water Act in order to preserve the sanctity of environmental law, Petitioner has not raised any issues which are of sufficient importance to warrant the Court's review. Every legal issue raised by Petitioner is well-settled throughout the Circuits. Petitioner has not raised a novel issue or an instance where the lower Court's application of law to the facts of the case are out of line with existing precedents. In truth, Petitioner's real complaint here is that he is not satisfied with the Circuit Court's adverse opinion. However, mere personal dissatisfaction with a properly rendered decision does not give rise to an issue worthy of this Court's review.

CONCLUSION

In the case at bar, Petitioner has offered no legitimate issue which warrants the Court's review. As demonstrated above, each issue raised in the Petition for Writ of Certiorari is well-settled law. Moreover, Petitioner has failed to show that there is any conflict within the Circuits or that the issues raised are of sufficient importance to merit review by the Court's review. As such, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

DONALD D.J. STACK
Counsel of Record
MARTIN A. SHELTON
STACK & ASSOCIATES, P.C.
Attorneys for Respondents
800 Flatiron Building
84 Peachtree Street
Atlanta, Georgia 30303
(404) 525-9205